UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE RAY CARTER, Plaintiff, v. THOMAS C. PAYNTER, et al., Defendants.	CASE NO. C09-0505-MJP-MAT REPORT AND RECOMMENDATION

INTRODUCTION AND BACKGROUND

Plaintiff proceeds *pro se* and *in forma pauperis* (IFP) in this 42 U.S.C. § 1983 civil rights case. He named over twenty different defendants in his complaint. (*See* Dkt. 13.) The Court dismissed claims brought against fourteen of those defendants (Dkts. 99, 102-103 & 106) and clarified that five other individuals are not considered parties to this action due to plaintiff's failure to provide either names or correct addresses (*see* Dkt. 99).

Upon review of the case record, the Court observed that this matter had not been screened prior to service pursuant to 28 U.S.C. § 1915(e)(2), which allows for dismissal at any time upon a determination that an IFP action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from

such relief, or pursuant to § 1915A, which requires screening of civil rights actions filed by prisoners and dismissal for the same grounds identified in § 1915(e)(2).[1] The Court, therefore, found it prudent to screen plaintiff's claims against the remaining named defendants: Anne Harper, Ken Ray, Bill Copland, John S. Blonien, and Shirill Reese.[2] The Court thereafter issued an Order to Show Cause, identifying deficiencies in plaintiff's claims against the remaining defendants and directing plaintiff to show cause, on or before April 9, 2010, why his claims against those defendants should not be dismissed. (Dkt. 104.)

To date, the Court has not received any response to the Order to Show Cause from plaintiff. In the interim, defendants Ray and Harper filed a motion for summary judgment, noted for consideration on May 7, 2010. (Dkt. 105.) The Court now recommends that plaintiff's claims against the remaining defendants be DENIED and this case DISMISSED for the reasons outlined in the Order to Show Cause and discussed below, and that Ray and Harper's motion for summary judgment be STRICKEN from the Court's calendar as moot.

DISCUSSION

In order to sustain a § 1983 claim, plaintiff must show (1) that he suffered a violation of

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1 The Complaint was served on defendants prior to referral to the undersigned. (*See* Dkts. 25 & 55 and docket entries dated June 18, 2009 and August 19, 2009.) Plaintiff was apparently not incarcerated when this action was originally filed, subsequently became incarcerated, and has since been released. In any event, the provisions of § 1915(e)(2)(B) are not limited to prisoners. *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001).

2 Defendants Harper and Ray submitted answers including the defense of failure to state a claim upon which relief can be granted (Dkt. 43 & 63), while State defendants Copland and Blonien did not submit their waivers of service until after the filing of a motion to dismiss by other State defendants (*see* Dkt. 88). Defendant Reese did not return a waiver of service and did not respond to an Order to Show Cause regarding service. (Dkt. 94.) Following screening of plaintiff's claims, the Court withdrew the Order to Show Cause directed to Reese. (Dkt. 104 at 2 n.3.)

rights protected by the Constitution or created by federal statute, and (2) that the violation was proximately caused by a person acting under color of state or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Conner*, 490 U.S. 386, 393-94 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144, n. 3 (1979)). The under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks and quoted sources omitted).

A plaintiff must allege facts showing how defendants individually caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A plaintiff may not hold supervisory personnel liable under § 1983 for constitutional deprivations under a theory of supervisory liability. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, a plaintiff must allege that a defendant's own conduct violated the plaintiff's civil rights.

Federal courts apply the forum state's personal injury statute of limitations to § 1983 claims. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985). A three year statute of limitations applies in Washington. RCW § 4.16.080; *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002). A § 1983 action accrues and the statute of limitations begins to run when a plaintiff knows or has reason to know of the injury which is the basis of his or her action. *Bagley v. CMC Real Estate Corp.*, 925 F.2d 758, 760 (9th Cir. 1991).

Vague and conclusory allegations are subject to dismissal. *See Moss v. United States*

Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) ("'[B]are assertions . . . amount[ing] to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim,' for the purposes of ruling on a motion to dismiss, are not entitled to an assumption of truth.") (quoting *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1951 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) ("'Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.'") (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Moreover, "the non-conclusory 'factual content,' [of the complaint] and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss*, 572 F.3d at 969 (quoting *Iqbal*, 129 S. Ct. at 1949).

Here, plaintiff asserts that, in accepting a plea offer in 2001, he provided his then counsel with a confidential statement describing an ongoing identity theft crime, and that his counsel passed this statement on to the Seattle Police Department and to Bank of America, which resulted in his two nieces, including Reese, losing their jobs with Bank of America. (Dkt. 13 at 15-16, 39-40.)[3] He states that Reese told him, on July 4, 2003, that she accessed the confidential statement in a job as a computer programmer at King County jail, made copies, and disseminated the document throughout the Seattle community where plaintiff was born and raised. (*Id*. at 40-41.)

Plaintiff further contends that a "murder for hire" contract on his life, to take place

3 Due to errors in numbering, the page numbers provided by plaintiff in his complaint do not in every instance match those of the page numbers for the cited docket entry. (Dkt. 13). For consistency, the Court cites herein only the docket entry page numbers.

following his release from prison in or around August 2008, resulted from the dissemination of the confidential statement. (*See, e.g.*, *id*. at 96.) He states that, beginning years prior to his release, he sent letters to various individuals regarding the perceived threat to his life and that those individuals either failed to respond or insufficiently responded to his letters. (*See, e.g.*, *id*. at 60-63.) Plaintiff also asserts that various other individuals ignored the threat to his life in acting or not acting with respect to his ultimate release from confinement and re-entry back into Seattle. (*Id*. at 93-97.)

Plaintiff argues that the named defendants violated his Fifth, Eighth, Thirteenth, and Fourteenth Amendment rights, various statutory rights, and, in some instances, obligations of professional responsibility. However, for the reasons discussed below, the Court concludes that plaintiff's claims against the remaining defendants should be dismissed.

A. Anne Harper

Plaintiff brings claims against Harper due to her position as the Director of the Office of the Public Defender and her alleged supervisory role over attorneys who represented plaintiff in criminal proceedings. (*Id*. at 11-26, 37-38.) Plaintiff alleges Harper violated her professional responsibilities and plaintiff's constitutional rights in failing to protect him from actions and/or inactions of his attorneys, whom he contends were Harper's employees,[4] in or around 2001 and 2004. (*Id*.)

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4 While the Court does not herein address the merits of the arguments raised in the summary judgment motion filed by Ray and Harper, it notes that, in a declaration attached to that motion, Harper attests that she had no supervisory authority over plaintiff's legal representatives, one of whom was employed by the Associated Counsel for the Accused and the other of whom is a solo practitioner. (Dkt. 105-3, ¶¶ 4-5.)

Plaintiff's assertions as to violations of any of Harper's professional responsibilities do not aver a constitutional or federal statutory violation and are not, therefore, properly pursued in this § 1983 action. To the extent plaintiff intended to target any work by Harper as a public defender, the United States Supreme Court has made clear that public defenders are not considered state actors for purposes of bringing suit under § 1983. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981).[5] Moreover, even considering Harper as a state actor, plaintiff here impermissibly seeks to hold her liable for constitutional deprivations under a theory of supervisory liability. *Taylor*, 880 F.2d at 1045. Finally, because the alleged incidents involving plaintiff's attorneys, and ostensibly Harper, occurred more than three years prior to the April 2009 filing date of plaintiff's complaint (*see* Dkt. 1), plaintiff's claims are barred the applicable three year statute of limitations. RCW § 4.16.080; *RK Ventures, Inc.*, 307 F.3d at 1058. For all of these reasons, plaintiff's claims against Harper should be dismissed.

B. Shirill Reese

Plaintiff avers that, following her termination from Bank of America, Reese secured a position with King County Jail for the sole purpose of obtaining a copy of his confidential statement. (Dkt. 13 at 38-41.) As stated above, plaintiff contends Reese proceeded to

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5 A defense attorney who conspires with state officials to deprive a client of his federal rights acts under color of state law and may be liable under § 1983. *See Tower v. Glover*, 467 U.S. 914, 923 (1984). However, plaintiff does not allege a conspiracy involving Harper. (Dkt. 13 at 37-38.) *See Price v. Hawaii*, 939 F.2d 702, 707-09 (9th Cir. 1991) (although the Court liberally construes pleadings, allegations of conspiracy are subject to a heightened pleading requirement, and the complaint must contain more than conclusory allegations). Nor does it appear that plaintiff could support such a claim. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc) ("To prove a conspiracy between the state and private parties under [§] 1983, the [plaintiff] must show an agreement or meeting of the minds to violate constitutional rights.") (internal quotation marks and quoted sources omitted).

disseminate the document throughout Seattle, resulting in threats against his life. (*Id.*)

Although pointing generally to the Fifth, Eighth, Thirteenth, and Fourteenth Amendments, plaintiff does not explain how Reese's actions constitute a violation of his constitutional or statutory rights. Instead, plaintiff's allegations against Reese are vague and conclusory. *See Moss*, 572 F.3d at 969. Nor do the allegations plausibly suggest a claim entitling plaintiff to relief. *Id*. Moreover, by plaintiff's admission, he knew or had reason to know about the leaked confidential statement as early as July 4, 2003. (Dkt. 13 at 40.) His claims against Reese are, therefore, barred by the applicable three year statute of limitations. RCW § 4.16.080; *RK Ventures, Inc.*, 307 F.3d at 1058; and *Bagley*, 925 F.2d at 760. Accordingly, plaintiff's claims against Reese should be dismissed.[6]

C. Ken Ray

Plaintiff asserts that Ray, as the Director of the King County Jail, failed to properly train and supervise Reese. (Dkt. 13 at 41-42.) However, as noted above, a plaintiff in a § 1983 action must allege facts showing how defendants individually caused or personally participated in causing the harm alleged in the complaint, *Arnold*, 637 F.2d at 1355, and may not hold supervisory personnel liable for constitutional deprivations under a theory of supervisory liability, *Taylor*, 880 F.2d at 1045. Here, plaintiff brings claims against Ray based solely on a theory of supervisory liability. Moreover, even if plaintiff had stated a viable claim against Ray, any such claim would also be subject to dismissal based on the applicable statute of

6 The Court observes that, in a declaration attached to Ray and Harper's motion for summary judgment, the Human Resources Manager for the King County Department of Adult and Juvenile Detention attests that Reese has never been employed by the King County Jail. (Dkt. 105-2, ¶ 3.)

limitations. RCW § 4.16.080; *RK Ventures, Inc.*, 307 F.3d at 1058; and *Bagley*, 925 F.2d at 760. As such, plaintiff's claims against Ray should be dismissed.[7]

D. Scott Blonien

Plaintiff claims that Blonien, Senior Assistant Attorney General of Washington State, violated his rights in responding to a letter plaintiff sent to Attorney General Rob McKenna regarding the above-described alleged murder plot. (Dkt. 13 at 69-77.) Blonien submitted a response on behalf of McKenna in April 2006, informing plaintiff that the Attorney General's Office was not allowed by law to provide legal advice to private citizens, and advising plaintiff to contact private counsel or to seek resolution through the Department of Corrections' Offender Grievance Program. (Dkt. 1-3 at 127.)

Plaintiff's allegations against Blonien are vague and conclusory, and do not plausibly suggest a claim entitling plaintiff to relief. *Moss*, 572 F.3d at 969. Indeed, there does not appear to be any basis for concluding that Blonien's response to plaintiff's letter – which addressed plaintiff's belief that a group of private citizens sought to murder him upon his eventual release from prison and possibly contained complaints about an attorney – constituted a violation of plaintiff's constitutional or federal statutory rights. *See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) ("As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *Tuffendsam v. Dearborn County*

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7 The above-described declaration, *see supra* n. 6, also declares that Ray was employed by the King County Jail from September 2004 through January 2005, *after* the time in which plaintiff claims he discovered Reese accessed and disseminated his confidential statement. (Dkt. 105-2, ¶ 2.)

Bd. of Health, 385 F.3d 1124, 1126 (7th Cir. 2004) ("[The Constitution] limits the powers of government but does not give people legally enforceable rights to demand public services and to obtain damages or other legal relief if the government fails to provide them.") For this reason, plaintiff's claims against Blonien should be dismissed.

E. Bill Copland

Plaintiff brings claims against Copland in his role as Washington State Penitentiary's Re-Entry Specialist. Plaintiff avers that, acting along with other State defendants, Copland violated his rights with regard to his release into Seattle despite the threats to his life. (Dkt. 13 at 93-96.)

As with the claims raised against other named State defendants (*see* Dkt. 99), plaintiff's allegations are no more than bare and conclusory, lacking any factual or legal support. *Moss*, 572 F.3d at 969. *See also Price v. Hawaii*, 939 F.2d 702, 707-09 (9th Cir. 1991) (allegations of conspiracy are subject to a heightened pleading requirement, requiring more than conclusory allegations). Moreover, even to the extent pursued as an Eighth Amendment failure to protect claim, *see generally Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991) (to establish an Eighth Amendment violation, an inmate must prove that prison officials were "deliberately indifferent" to a serious risk of harm to his well-being) and *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (a prison official may be held liable "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."), plaintiff does not identify any harm he suffered. As such, any Eighth Amendment claim against Copland is also subject to dismissal. *See, e.g.*, *Williams v. Wood*, No. 06-55052, 2007 U.S. App. LEXIS 4884 at *2-3 (9th Cir. Mar. 1, 2007) (failure to protect claim properly

dismissed where plaintiff did not allege he had been assaulted or threatened by other inmates "and his speculative and generalized fears of harm at the hands of other prisoners do not rise to a sufficiently substantial risk of serious harm to his future health.") (citing *Farmer*, 511 U.S. at 843); *Morgan v. MacDonald*, 41 F.3d 1291, 1293-94 (9th Cir. 1994) (rejecting Eighth Amendment claim where inmate labeled a snitch had not been retaliated against). Therefore, as with the other defendants, plaintiff's claims against Copland should be dismissed.

CONCLUSION

In sum, plaintiff failed to adequately state a claim against Harper, Reese, Ray, Blonien, or Copland, either in his Complaint or in a response to the Order to Show Cause. Also, as indicated above, the John Doe defendants, Thomas C. Paynter, Harold Lee, and Dina Dominguez have not been served and are not considered defendants to this action. Accordingly, the Court recommends that plaintiff's claims against the remaining defendants be DENIED and this case as a whole DISMISSED. The Court further recommends that the pending motion for summary judgment filed by Ray and Harper (Dkt. 105) be STRICKEN as moot. A proposed order accompanies this Report and Recommendation.

DATED this 26th day of April, 2010.

Mary Alice Theiler
United States Magistrate Judge